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IN THE

Supreme Court of the United States

October Term, 1972

NO. 72-1045

BIBLE BAPTIST CHURCH, *Petitioner,*

versus

CHARLES IRELAND, F. H. ALSOBROOK, and CHARLES A. RIDENOUR, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reason for Granting Writ	5
The right to build churches and to use the same for church purposes is implicit in the constitutional guarantee of religious freedom.	5
Conclusion	7
Certificate of Service	8
APPENDIX A	
Judgment of the trial court, the 60th District Court of Jefferson County, Texas	9-12
APPENDIX B	
Opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas	13-26
APPENDIX C	
Judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas	27
APPENDIX D	
Supreme Court of Texas denial of Application for Writ of Error	28
APPENDIX E	
Supreme Court of Texas denial of Motion for Rehearing	29

INDEX TO CITATIONS

CASES

	Page
Hamilton v. University of California, 293 U.S. 245	6
Ireland v. Bible Baptist, 480 S.W.2d 467	2
Palko v. Connecticut, 302 U.S. 319, 82 L.Ed. 288	6
Pierce v. Society of Sisters, 268 U.S. 510	6
Shelley v. Kraemer, 334 U.S. 1, 92 L.Ed. 1161	6

STATUTES

28 U.S.C. Section 1257(3)	2

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Petitioner, Bible Baptist Church, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, entered in this proceeding on April 27, 1972.

OPINION BELOW

The judgment of the trial court, the 60th District Court of Jefferson County, Texas is printed in Appendix A to this petition (pp. 9-12, *infra*). The opinion of the Court

of Civil Appeals for the Ninth Supreme Judicial District of Texas is reported at 480 S.W.2d 467, and is printed in Appendix B to this petition (pp. 13-26, *infra*).

JURISDICTION

The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont was entered on April 27, 1972, a timely motion for rehearing was denied on May 18, 1972. (see Appendix C, p. 27, *infra*). The Supreme Court of Texas denied a timely-filed application for a writ of error on October 4, 1972 (Appendix D, p. 28, *infra*), and a motion for rehearing was denied November 1, 1972 (see Appendix E, p. 29, *infra*), and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment prohibits judicial enforcement by state court of restrictive deed covenant against the building of a church and the holding of church services.

STATEMENT OF THE CASE

Petitioner, Bible Baptist Church, an independent Baptist church with a congregation of several hundred people, owns land in the incorporated city of Beaumont, Texas, in a subdivision of said city, where the landowners hold title by deeds which specify that:

> "No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one single-family dwelling not to exceed

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two and one-half stories in height and appropriate garage for not more than two cars."

The deed by which petitioner holds is encumbered by such restrictions by reference.

Petitioner moved two buildings onto the land in April 1971 and began using them for church services. Suit in the district court was brought by three land owners of the subdivision to enjoin Bible Baptist Church from using its lands for church purposes and to compel the removal of the buildings.

Petitioner, in its first amended original answer asked the court to deny the relief sought on the grounds that the property is being used for the sole purpose of worship and church purposes, and that a denial of the right to use such premises for such purposes of worship would be a denial of freedom of worship in violation of the First and Fourteenth Amendments to the Constitution of the United States.

The trial court, holding that no jury issue had been presented, gave judgment to respondents (Appendix A) granting the injunction against improving, using or occupying petitioner's land for church purposes, but refused to order removal of the present church structures.

Each respondent testified, in substance, that the presence of the church had not actually disturbed him in the occupancy of his home, nor did any respondent contend that he had suffered actual monetary damage by reason of its presence. Each feared that if the restrictions were not maintained, the area would depreciate in value by other non-complying uses being made of this and other lots in the addition (Appendix B, p. 15, paragraph 3).

Bible Baptist Church filed supersedeas appeal bond, permitting the continuation of worship on the premises and perfected its appeal. Respondents appealed the portion of the trial court judgment denying mandatory removal of buildings.

Bible Baptist Church perfected its appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas and in its third point of error in said brief, preserved its objection to the action of the trial court as being an unconstitutional infringement of the Fourteenth Amendment right to freedom of religion and freedom of worship. The Court of Appeals on April 27, 1972, by written opinion (Appendix B), overruled these contentions and also ruled that the church structures be ordered removed, which order supersedeas bond stays.

In its motion for rehearing in the Court of Civil Appeals, Bible Baptist Church carried forward its objection to the unconstitutional action of the trial court in granting and the Court of Civil Appeals in upholding the granting of the injunction prohibiting church use in violation of the right to worship as guaranteed by the Fourteenth Amendment. Motion for rehearing was denied May 18, 1972.

Petitioner thereupon filed its application for Writ of Error in the Supreme Court of Texas, charging in its third point of error that "the Court of Civil Appeals erred in affirming the judgment of the trial court enjoining the church from using its property for church purposes and further erred in reversing the trial court and granting mandatory injunction because such rulings violated the First and Fourteenth Amendments to the Constitution of the United States of America and denied Bible Baptist

Church freedom of religion and freedom of worship." On October 4, 1972, the Supreme Court of Texas refused application for Writ of Error, finding no reversible error.

Petitioner's timely-filed motion for rehearing with the Supreme Court of Texas, restated and preserved the constitutional question in its third point of error. The Supreme Court of Texas, on November 1, 1972, overruled motion for rehearing and petitioner herenow, within 90 days from the last ruling of the Supreme Court of Texas, files its Petition for Certiorari in the Supreme Court of the United States.

REASON FOR GRANTING WRIT

The right to build churches and to use the same for church purposes is implicit in the constitutional guarantee of religious freedom, *Congregation Committee, etc. v. City Council,* 287 S.W.2d 700. We quote from the opinion:

> "To deny the (building) permit . . . would not only prevent the use of the church but would restrict the right of freedom of worship and assembly to an extent that outweighs any benefit to the safety, health, morals and general welfare of the public. In a situation like this, the police power must yield to the constitutional right of freedom of worship and assembly."

Having thus established the right to build and use a church *as a constitutional right,* we move to the question of whether this constitutional right shall prevail, or shall give way to the state action by which a state court at-

tempts to enforce the provisions of a restrictive deed covenant prohibiting church construction and church services on land owned by the church.

In appellant's brief filed in the Court of Civil Appeals we cited *Shelley v. Kraemer,* 334 U.S. 1, 92 L.Ed. 1161, 3 A.L.R.2d 441 (1948) wherein judicial enforcement by a state court of a restrictive covenant was held to be unconstitutional under the 14th Amendment to the U. S. Constitution because it constituted "discriminatory action on the part of the state based on consideration of race or color."

Although the Court of Civil Appeals states that no reliance can be placed on *Shelley* because it deals with discrimination, we have cited *Shelley* to demonstrate that a constitutional right is superior to state action which prevents the enjoyment of that right. While the rights themselves are different, in *Shelley* freedom from discrimination based on race or color, and in *Bible Baptist* freedom of religion, both are of constitutional stature. *Shelley* is protected by the equal protection clause of the Fourteenth Amendment, *Bible Baptist* by the due process clause. In *Palko v. Connecticut,* 302 U.S. 319, 82 L.Ed. 288, the Supreme Court decreed as follows: "The due process clause of the Fourteenth Amendment makes it unlawful for a state to abridge . . . the free exercise of religion. *Hamilton v. University of California,* 293 U.S. 245; *Pierce v. Society of Sisters,* 268 U.S. 510."

It is thus apparent that the First Amendment guarantee of freedom of worship has been incorporated into the Fourteenth Amendment thereby protecting the right against adverse state actions.

We think this is a case where a state court has decided a federal question of substance not theretofore determined by this Court. We do not think it necessary to belabor the Court with statistics showing the number of churches in our urban and suburban areas, nor the increase in areas covered by restrictive covenants.

The interests in conflict on the side of the restrictive covenant: The possible protection of the homestead as a valuable investment, and some assurances against disturbances by church services. On the side of freedom of religion we have all of those benefits attributed to the influence of religion by the signers of the constitution.

If those benefits are to be realized by the people, surely it must be preached and taught where the people live.

CONCLUSION

For these reasons, the Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont.

Respectfully submitted,

PHILLIP BORDAGES
2860 Park Street
Beaumont, Texas 77701

Attorney for Petitioner

IN THE

Supreme Court of the United States

October Term, 1972

NO._____

BIBLE BAPTIST CHURCH, *Petitioner,*

versus

CHARLES IRELAND, F. H. ALSOBROOK, and CHARLES A. RIDENOUR, *Respondents*

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 1973, three copies of the Petition for writ of Certiorari were mailed, postage prepaid, to Dale Dowell, Beaumont Savings Building, Beaumont, Texas 77701, Counsel for the Respondent. I further certify that all parties required to be served have been served.

PHILLIP BORDAGES
2860 Park Street
Beaumont, Texas 77701

Attorney for Petitioner

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APPENDIX A

NO. B-96248

CHARLES IRELAND, ET AL

v.

BIBLE BAPTIST CHURCH

IN THE DISTRICT COURT
OF
JEFFERSON COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 1st day of November, 1971, came on for trial the above styled and numbered cause, wherein Charles Ireland, F. H. Alsobrook and Charles A. Ridenour are plaintiffs and Bible Baptist Church, a nonprofit corporation organized and existing under the laws of the State of Texas, is defendant; whereupon, all parties having announced ready for trial, a jury was duly impaneled and sworn, consisting of twelve good and qualified jurors, the pleadings were read, the evidence was introduced and all parties rested on the 3rd day of November, 1971, at which time the plaintiffs presented to the Court their Motion for Instructed Verdict, which said motion the Court granted because the undisputed evidence shows as a matter of law that to allow this defendant to use or improve as a church or for chuch purposes any or all of the lands and premises in question would be in contravention of and would constitute a breach and violation of the following restrictions as per map, dedication and restrictions of record in Vol. 7,

Page 97, Map Records of Jefferson County, Texas, and Vol. 746, Page 65, et seq., Deed Records of Jefferson County, Texas, to-wit:

> "1. All Lots in the tract shall be known and described as residential lots, except Lot One (1) in Block One (1). No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height, and a private garage for not more than two cars."

All to the irreparable damage and injury of said plaintiffs, of which they have no adequate remedy at law.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that the defendant, Bible Baptist Church, its officers, agents, servants, employees be, and they are hereby, now permanently enjoined from, and that they shall desist from, either improving, using or occupying for the purposes of a church in violation, breach and contravention of the aforesaid restrictions, either express or implied, the following lots, lands and premises situated and located in the Lakeview Terrace Addition to the City of Beaumont, Jefferson County, Texas, to-wit:

TRACT ONE

Lots Nine (9) and Ten (10), Block Two (2) Lakeview Terrace Addition, SAVE AND EXCEPT, a strip of land 15 ft. wide off of the rear or S.W. end of Lot 9 and a strip of land 15 ft. wide off of the rear or S.W. end of the N.W. 25 ft. of Lot 10, being those strips of land which were heretofore conveyed to Ellis Droddy and J. Bain Price, Jr. by

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deeds dated June 17, 1954, recorded in Vol. 940, Pages 34 and 40, respectively, of the Deed Records of Jefferson County, Texas, subject to all reservations, restrictions, easements and covenants of record affecting said property.

TRACT TWO

That certain tract of land lying immediately South of Lot 10, Block 2 of the Lakeview Terrace Addition to the City of Beaumont, as per map or plat of said addition of record in Vol. 7, Page 97, Map Records, Jefferson County, Texas, beginning at a point where the South boundary line of said Lot 10, Block 2 of the Lakeview Terrace Addition to the City of Beaumont, Texas, intersects the Westerly boundary line of U. S. Highway No. 69 a distance of 89.26 ft. for corner; THENCE South 67 deg. 30 min. West 209.57 ft. for corner which has a perpendicular distance of 200 ft. from the West boundary line of U. S. Highway No. 69; THENCE in a N.W. direction a distance of 24.56 ft. for corner, being also the S.W. corner of Lot 10, Block 2 of the Lakeview Terrace Addition; THENCE North 49 deg. 2 min. East 200 ft. to place of beginning, containing .261 acres of land, more or less,

and in particular with the restrictions that said lots, lands and premises be neither improved, used nor occupied for any purpose other than for residence purposes.

And it appearing to the Court as a matter of law that the church structures presently on and upon the above described premises are not on and upon said premises in violation of any of said restrictions of record at Vol. 746, Page 65, et seq., Deed Records of Jefferson County, Texas, it is ORDERED, ADJUDGED and DECREED

by the Court that the plaintiffs, Charles Ireland, F. H. Alsobrook and Charles A. Ridenour, be and they are hereby denied, as against the defendant, Bible Baptist Church, a decree requiring the removal of all present church structures upon said premises.

And it further appearing to the Court that the cross-action asserted herein by the defendant, Bible Baptist Church, against the plaintiffs is not well taken, it is ORDERED, ADJUDGED and DECREED that the defendant, Bible Baptist Church, take nothing of and against the plaintiffs, Charles Ireland, F. H. Alsobrook and Charles A. Ridenour, upon its cross-action asserted against them herein and that they go hence without day.

It is further ORDERED, ADJUDGED and DECREED by the Court that the plaintiffs do have and recover of and from defendant all costs in this behalf expanded, for all of which let writs of injunction and execution issue.

Any other relief not expressly granted herein is hereby in all things denied.

To all of which, in open court, the plaintiffs and defendant duly excepted and gave notice of appeal to the Court of Civil Appeals for the Ninth Judicial District sitting at Beaumont.

SIGNED, RENDERED and ENTERED this the 22nd day of November, A. D. 1971.

/s/ HAROLD CLAYTON
District Judge Presiding

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APPENDIX B

NO. 7343

CHARLES IRELAND, ET AL., *Appellant-Appellee*

v.

BIBLE BAPTIST CHURCH, *Appellee-Appellant*

(Filed April 27, 1972)

Plaintiffs below, Ireland, et al, brought suit to enjoin the defendant, Bible Baptist Church, from using certain lands for church purposes contending that such use violated the deed restrictions in the addition. Plaintiffs also sought a mandatory injunction to compel the removal of two frame structures placed thereon by the defendant. At the conclusion of the evidence, the trial court granted plaintiffs' motion for a peremptory instruction and entered judgment enjoining the defendant from further using the land for church purposes but denying the mandatory relief which would have required the defendant to remove the buildings then located upon the land. Both sides having appealed, we will designate the parties as they appeared in the trial court.

The Church holds title to the land under deed from Roy D. Brite, et al, and the property is that described in the opinion of this court in *Brite v. Gray*, 377 S.W.2d 223 (Tex. Civ. App., Beaumont, 1964, no writ), to which we refer for more details. The pastor of the defendant Church is the Reverend Mr. J. Boyd Davis whose conviction for contempt in violating the injunction issued in *Brite v. Davis*, supra, was reviewed by the Supreme Court

in *Ex Parte Davis,* 470 S.W.2d 647 (Tex. Sup. 1971), to which we also refer for more details. The facts are not in dispute although the parties are in disagreement as to the law governing such facts.

Although a veternary clinic was involved in the *Brite Case* and a church is involved in this case, the restrictions are the same, only those pertinent to the decision having been set out in *Brite.* As applied to this case, the restrictions specify that:

> "No structure shall be erected,, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in heights and a private garage for not more than two cars."

The defendant Church acquired the property by deed from Dr. Brite dated August 16, 1965. On August 31, 1965, counsel for the present plaintiffs addressed a letter to the pastor of the Church advising of the restrictive covenants applicable to the addition and of the holding of this court in *Brite v. Gray.* The defendant made no use of the land until April 28, 1971, when it moved two buildings on to the land. The Reverend Mr. Davis described the buildings in this manner:

> "Well, they're frame buildings, one of them is about forty by eighty, I guess, and the other one maybe twenty by twenty-four. One of them is used for Sunday School, young people's meeting place, and the other is the Sanctuary with three or four classrooms in it."

The larger of the two buildings is the sanctuary where preaching services are held and the smaller building is

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used for Sunday School purposes. There are no sleeping facilities in either building.

At some time in the future, presumably when financially able, Church intends to construct a new building upon the premises but no definite plans therefor were in existence at the time of the trial.

By the first two points, the defendant contends that the trial court erred in peremptorily instructing the jury to return a verdict for the plaintiffs because (a) the evidence showed that the individual plaintiffs had suffered no damage by reason of the use of the property for church purposes; and (b), alternatively, the evidence raised a question for the jury to determine if plaintiffs had sustained actual damage. Each of the plaintiffs testified, in substance, that the presence of the church had not actually disturbed him in the occupancy of his home nor did either plaintiff contend that he had sustained actual monetary damage by reason of its presence. Each feared that if the restrictions were not maintained, the area would depreciate in value by the other noncomplying uses being made of this and other lots in the addition.

We disagree with defendant and overrule the points. In *Cowling v. Colligan,* 158 Tex. 458, 312 S.W.2d 943, 946 (1958), the court said:

> "The authorities are uniform in declaring that the erection of a church violates a covenant restricting the use of property for residential purposes."

This case was followed by *Protestant Episcopal Church Council v. McKinney,* 339 S.W.2d 400, 403 (Tex. Civ. App., Eastland, 1960, error ref.), wherein the court, rec-

ognizing the general rule advanced by defendant in our case, continued, saying:

> "However, an exception to the above stated general rule is found in cases holding that a covenant restricting the use of land may be enforced by injunction where a distinct or substantial breach is shown, without regard to the amount of damages caused by the breach, and that in such cases it is not necessary to show the existence of any particular amount of damages or to show that the injury will be irreparable."

Having reviewed the record, we say, as did the Eastland court in the *McKinney Case*, supra: "In our opinion the evidence supports the conclusion that the breach of the restrictive covenant in the instant case is a distinct and substantial one." (339 S.W.2d at 404) We go even further and say that such fact was established as a matter of law, thereby authorizing and requiring the trial court to grant the motion for peremptory instruction.

Defendant's third and fourth points contend that the injunction denies to defendant its freedom of religion and of worship, thereby running afoul of the First and Fourteenth Amendments to the Constitution of the United States and Article 1, § 6 of the Constitution of the State of Texas, respectively. We express our complete and wholehearted adherence to and support of each of the constitutional provisions cited; but, we reject the contentions so advanced. The only case remotely in point cited by defendant is that of *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441 (1948). The restrictions involved in *Shelley* provided that no part of the property could be " 'occupied by any person not

of the Caucasian race' " and could not be used " 'for resident or other purpose by people of the Negro or Mongolian Race.' " (334 U.S. at p. 10) Judicial enforcement of the restrictive covenant was denied because it constituted "discriminatory action on the part of the States based on considerations of race or color." (334 U.S. at p. 23)

Defendant's reliance upon *Shelley* is misplaced. The restriction which was enforced in the instant case applied equally to churches of all denominations and faiths. If the restriction applied only to Baptist churches while permitting those of other denominations, the rationale of *Shelley* would be more persuasive. Defendant's points three and four are overruled.

In *Brite v. Gray,* supra, this court pointed out that the deed into Brite described two tracts of land: Tract One, all of Lots Nine and Ten in Block Two, and a small strip of property contiguous thereto containing .261 acres, designated as Tract Two (377 S.W.2d at p. 224). The deed from Brite to defendant Church, conveying the identical land mentioned in the prior decision of this court, included the restrictions which appeared in the deed to Brite as to Tract One but did not refer to the restrictions in describing Tract Two.

Defendant contends that Tract Two was not included in the original plat or dedication of the addition but, upon the contrary, such land "constitutes builtup land outside of the platted portion of the subdivision" and not controlled by the restrictions as to the other lots. Alternatively, defendant contends that a fact issue was presented for determination by the jury. Defendant offered testimony

that after the dedication of the subdivision in 1949, the developers permitted a contractor engaged in improving a nearby street to dump the spoil into the lake and a substantial area was reclaimed from the lake which became a part of Tract Two.

Brite's conveyance to the Church followed precisely the form of the deed whereby he acquired the land from Austin, as mentioned in *Brite v. Gray,* supra, and did not include the restrictions as to Tract Two. However, in the chain of title to the property acquired by defendant Church there appeared the deed mentioned in the *Brite Case* from the developers to Austin which did contain the restrictions. The court disposed of the point in this manner:

> "Moreover, the Austins accepted title to Tract Two with restrictions imposed thereon. These were restrictive covenants running with the land. They could convey no greater estate to appellants than that which they had received. Matthews v. Rains County, Tex. Civ. App., 206 S.W.2d 852.
>
> "We hold that appellants' property, Tract Two (2), is burdened with the same restrictions applicable to other lots in the addition and that the trial court correctly issued the injunction." (377 S.W.2d at p. 225)

The land which Brite sold to the Church was burdened with the restrictions as to both tracts and he could not, just as Austin could not, convey a greater estate than that which he had received. The restrictions were a part of Brite's title and the Church could not trace its title back to its source without being directly informed of the existence of the restrictions as to Tract Two.

A purchaser is charged with and bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims. *Wessels v. Rio Bravo Oil Co.*, 250 S.W.2d 668, 670 (Tex. Civ. App., Eastland, 1952, error ref.). Thus, the Church was chargeable with notice, not only of the restrictions appearing in its deed, but also with notice of whatever a diligent inquiry would have revealed. *Carter v. Hawkins*, 62 Tex. 393, 397 (1884). Inquiry would have brought home to the Church knowledge that this court had theretofore held Tract Two to be covered by the restrictions applicable to the entire subdivision.

The rule of collateral estoppel or estoppel by judgment is also applicable in this case. For an authoritative discussion of the rule, see *Benson v. Wanda Petroleum Company*, 468 S.W.2d 361 (Tex. Sup. 1971). The Church, being in privity with Brite, its grantor, is bound by the judgment of this court holding the restrictive covenants applicable to Tract Two. *Kirby Lumber Cor. v. Southern Lumber Co.*, 145 Tex. 151, 196 S.W.2d 387 (1946).

Additionally, the doctrine of res judicata is applicable here. Res judicata, extending both to questions of law and issues of fact, binds not only the parties to the first suit but those who claim under them. *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. Sup. 1964). See also, *Cain v. Balsom*, 130 Tex. 497, 109 S.W.2d 1044, 1045 (1937).

We recognize the rule that in construing covenants restricting the use of land, all doubt should be resolved in favor of freer use of land and against the restrictions.

But, in this instance, there is no ambiguity in the restrictive covenants and they must be enforced as written. Cf. *Southampton Civic Club v. Couch,* 159 Tex. 464, 322 S.W.2d 516 (1958). Points five and six are overruled.

The Church next contends that the trial court erroneously granted the peremptory instruction because, as it is phrased in point seven, "the undisputed evidence in this case shows that no other use of the land could be made and that the land was not suitable for any other use than that to which it was being put." Alternatively, by point eight, it contends that a fact issue was presented which should have been submitted to the jury. We disagree and overrule both points.

The two tracts owned by the defendant constituted "a border tract and is openly exposed to" changed conditions, as mentioned in *Cowling v. Colligan,* supra (312 S.W.2d at 946). Assuming, without deciding, that there was some evidence of changed conditions outside the subdivision since the dedication of the addition, nevertheless, defendants may not prevail. This result is required because there was no evidence that the benefits of the original plan for a restricted subdivision could not still be realized for the protection of the interior lots. *Cowling v. Colligan,* supra; *Western Management Corp. v. High Crest Realty Co.,* 331 S.W.2d 365, 367 (Tex. Civ. App., Fort Worth, 1960, error ref.).

Nor does the fact that the City of Beaumont may have zoned the property in such a manner it could be used for purposes other than single family dwellings alter the result. *Lebo v. Johnson,* 349 S.W.2d 744, 751-752 (Tex. Civ. App., San Antonio, 1961, error ref. n.r.e.).

Finally, defendant contends that by reason of the use to which other lots in the subdivision had been put in the past, there were issues of waiver and estoppel raised which should have been submitted to the jury. Defendant has neglected to cite to us the record references supporting such claims, but our own study of the record convinces us that no such issues were raised by the evidence.

It is contended that Coastal Pools, a commercial establishment, has operated without challenge by plaintiffs. Such fact is true to the record, but defendant neglects to advise us that Coastal Pools is situated upon Lot One of Block One. The dedication and the deed restrictions both specifically mention this particular lot, the language being:

> *Dedication:* "(1) All lots in the tract shall be known and described as residential lots, except Lot One (1), in Block One (1). * * *"
>
> *Deeds:* "(5) * * * Lot One (1) in Block One (1) is reserved for commercial purposes and any building used for retail sales may be erected on this site. * * *"

There is also some record reference to the holding of church services in the home of one of the plaintiffs and defendant contends that such constituted a violation of the restrictive covenants which would authorize the application of the doctrine of waiver and estoppel.

There are several difficulties experienced when this latter contention is considered. Defendant did not prove by any competent evidence that the holding of the church services in the house of one of plaintiffs was "the principal and primary uses for which the property is main-

tained." Thus, we face the opposite situation to that found in *McKinney*, supra (339 S.W.2d at p. 404). For aught that appears in our record, the occasional services held in one plaintiff's home was purely incidental thereto and not violative of the restrictions. *Southampton Civic Club v. Couch*, supra, (322 S.W.2d at p. 518).

Furthermore, such activities were merely trivial in nature and did not constitute a waiver of the right to enforce the restrictions against the defendant in this case. *Stewart v. Welsh*, 142 Tex. 314, 178 S.W.2d 506, 508 (1944); *Cowling v. Colligan*, supra (312 S.W.2d at p. 946).

Having carefully reviewed all of defendant's points challenging the judgment of the trial court granting the prohibitory injunction and finding no error, the judgment prohibiting the further use of the land for church purposes is in all things AFFIRMED.

We turn now to the appeal of the plaintiffs below from the portion of the judgment which denied their prayer for a mandatory injunction requiring the defendant to remove the buildings now being used for church purposes from the land involved.

Plaintiffs' point is that since the undisputed evidence showed that the "mere presence of the church structures upon the lands and premises in question is in violation of the deed restrictions made the basis of this suit, the Trial Court erred in failing to require" the removal of the structures.

Admittedly, plaintiffs' pleadings were adequate to support the mandatory relief which it sought and we have already upheld the trial court's finding that the presence

of the structures was violative of the restrictions upon the land.

In several cases cited to us, the violation of restrictions having been established by the evidence, the plaintiffs became entitled to have the offending structures removed. In *Melton v. Miller*, 391 S.W.2d 568 (Tex. Civ. App., Houston, 1965, no writ), the trial court having found the violation of the restrictive covenant, granted a mandatory injunction to require the removal of a carport and the judgment was affirmed. In *Shepler v. Falk*, 398 S.W.2d 151 (Tex. Civ. App., Austin, 1965, error ref. n.r.e.), a fence constructed in violation of deed restrictions was ordered removed and the judgment was affirmed.

Finally, in *Braes Manor Civic Club v. Mitchell*, 368 S.W.2d 860, 861 (Tex. Civ. App., Waco, 1963, error ref. n.r.e.), defendants were using a lot as a parking lot for tenants in apartment houses. The trial court denied the injunctive relief, prohibitory and mandatory, and upon appeal the judgment was reversed, the court saying that:

> "The trial court should have rendered judgment enforcing the restrictions. The judgment is accordingly reversed and remanded to the Trial Court with instructions to enter permanent injunction restraining defendants from using lot 7 as a parking lot; and requiring defendants to remove the paving, carports and fencing, used in connection with parking, from such lot."

Defendant, in its reply to plaintiffs' appeal from the denial of the mandatory injunction, simply reiterates its contentions which we have overruled earlier. Thus, its defense of the trial court's action in denial of the manda-

tory injunction does not answer the contention that plaintiffs received only half the relief to which they claimed to be entitled.

In *Bickler v. Bickler,* 403 S.W.2d 354, 361 (Tex. Sup. 1966), the mandatory injunction to require the removal of a sidewalk was sought by trial amendment when a surveyor established that the sidewalk in question was upon plaintiff's lands. This action of the trial court was singled out for approval by Chief Justice Calvert.

In *6 Texas Practice, Remedies, Lowe & Archer,* § 330, p. 343 (1957), it is said that "Texas courts do not hesitate to issue the writ [of mandatory injunction] when it is essential to remedy a wrong and no other adequate means of effecting the needed relief exists." The *Bickler, Braes Manor,* and *Melton Cases,* supra, are cited in support of the text.

The right to the mandatory relief, when such is necessary to afford a party full protection of his established rights, is clear under the Texas decisions. Indeed, as applied to the facts of this case, it is "the only pertinent remedy available." *City of Mission v. Popplewell,* 156 Tex. 269, 294 S.W.2d 712, 715 (1956).

From our description of the two structures which were moved on to the disputed premises from elsewhere in Beaumont, it is readily apparent that the structures were not designed nor suitable for use as a private residence. Indeed, defendant made no contention in the court below that such structures were useful for any purpose other than for what they were designed and built originally—church purposes. Nor did defendant seek to justify the placement of the structures on the particular land under

any theory of law other than those discussed by us in its appeal—none of which have been found compatible with the law and the facts.

Instead, the Reverend Mr. Davis justified the continuing use of the property in this manner:

> "Q. Is the sole basis upon which you contend that the Church is rightfully on that land the fact that it's your contention that this is a single-family residence or these are single-family residences?
>
> "A. Yes, we contend that this is a single family of God who meet in God's House, like every other gathering of Christian people.
>
> "Q. And that is the sole basis upon which you contend that the Church is rightfully on that land?
>
> "A. That it is a House of God and single residence, yes."

We are not in a position to and do not take issue with the theological base of the contention so advanced. However, with all deference to the ecclesiastical expertise of the Reverend Mr. Davis, we disagree with his legal interpretation of the respective covenant involved here.

Since we are required to follow the authoritative decisions of our courts, we now hold that the use being made of the land involved is, as a matter of law, violative of the restrictions. *Cowling v. Colligan*, supra, and *Protestant Episcopal Church Council v. McKinney*, supra.

Plaintiffs were entitled to all of the relief which they sought and the trial court erred in refusing to grant the mandatory injunction to compel the removal of the strutures from the premises. The judgment, insofar as it denied

plaintiffs the mandatory injunction sought, is reversed and the cause remanded to the trial court with instructions to enter a permanent injunction requiring the defendant to remove the structures presently upon the premises in question.

The judgment of the trial court is in part affirmed and in part reversed and remanded with instructions.

Quentin Keith

Opinion delivered
April 27, 1972

APPENDIX C

COURT OF CIVIL APPEALS
Ninth Supreme Judicial District
Beaumont, Texas
77001

Martin Dies, Jr., Chief Justice
Homer E. Stephenson,
Associate Justice
Quentin Keith, Associate Justice

Elizabeth LeBlanc
Clerk

May 18, 1972

RE: No. 7343-Charles Ireland, et al., v. Bible Baptist Church

Hon. H. M. Oldham
Beaumont, Texas

Hon. A. W. Dycus
Beaumont, Texas

Hon. Phillip Bordages
Beaumont, Texas

Rienstra, Rienstra & Dowell
Beaumont, Texas

Gentlemen:

The Motion for Rehearing by Bible Baptist Church in the above styled cause has been overruled this day.

Yours very truly,

Clerk

APPENDIX D

CLERK'S OFFICE—SUPREME COURT
Austin, Texas

October 4, 1972

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of CHURCH v. IRELAND ET AL., No. B-3443, was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX E

CLERK'S OFFICE—SUPREME COURT
Austin, Texas

November 1, 1972

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of BIBLE BAPTIST CHURCH v. IRELAND ET AL., No. B-3443, was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

72-1060

FILE COPY

Supreme Court, U. S.
FILED
JAN 31 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

72-1060
No. 72-1702

CALVIN SPURGEON JOHNSON,
Petitioner

-vs.-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

W.H. McELWEE
JOHN E. HALL
MCELWEE & HALL
906 B Street Rear
North Wilkesboro
North Carolina 28659

INDEX

OPINION BELOW 1

JURISDICTION 3

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

REASONS RELIED
FOR THE ALLOWANCE FOR THE WRIT 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

NO. 72-1702

CALVIN SPURGEON JOHNSON
Petitioner

-vs.-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE PETITIONER, CALVIN SPURGEON JOHNSON, petitions the Supreme Court of the United States for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the Judgment and mandate of that court affirming the Judgment of the United States District Court for the Western District of North Carolina.

OPINION BELOW

The Judgment of the Court of Appeals for the Fourth Circuit (Petitioner's Appendix I) is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered on the 11th day of December, 1972. The jurisdiction of this court is invoked pursuant to Title 28 U S C Section 1254.

QUESTIONS PRESENTED

1. Is the "Miranda Warning" required of a Federal officer who had Petitioner under investigation for violation of Federal Penal laws when it appears that the Petitioner is about to incriminate himself?

2. Is the Petitioner entitled to the defense of entrapment wherein a conversation with a Federal officer, he states "A man could do some good if he had somebody to help him, if he had a man too look after him", and the Federal officer replies, "What do you mean, do you want me to look after you?", and thereafter the two agree on a price for the officer to "look after" the Petitioner and the officer with the consent of his superiors accepts money with intent to prosecute the Petitioner?

3. Where a Government agent acting at the direction and knowledge of the government accepts a bribe to be paid in several installments, may the defendant who pays the bribe in several installments, be prosecuted for the payment of each installment or may the government prosecute for only one such bribe even though the bribe was payable in several installments.

STATEMENT OF THE CASE

The Petitioner was tried in the United States District Court for the Western District of North Carolina on an indictment containing eight separate counts. Each count charged the Petitioner with the bribery of one Henry D. Byrd a Special Agent of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service. 18 U S C Section 201 (b) (3). The District Court sitting without a jury entered the verdict of guilty as to each of the indictment.

The evidence may be summarized as follows:

The Federal agent, Henry D. Byrd, had been assigned to investigate the activities of the Petitioner for a long period of time prior to September 21, 1969. On that date, the Petitioner telephoned Byrd at his residence in Charlotte, North Carolina and advised Byrd that he had some information which might be interesting to Byrd. At that time Byrd advised Johnson that he had been assigned to work on and apprehend him for violation of Internal Revenue laws relating to illicit distilled spirits.

Pursuant to this telephone conversation, the Petitioner and Byrd met on September 21, 1969 at Howard Johnson's Restaurant in Charlotte, North Carolina and engaged in a general conversation with respect to certain persons suspected of violating the Internal Revenue laws relating to illicit distilled spirits. Subsequent to this date, the Petitioner and Byrd met on several other occasions and engaged in similar conversations but talked specifically about one particular alleged violator.

On August 3, 1970, the Petitioner and Byrd again had a meeting and on this occasion, the Petitioner advised Byrd of the location of an illicit distillery. They continued

in the conversation with respect to the liquor laws and during said conversation, the Petitioner made the following statement to Byrd, "A man could do some good if he had somebody to help him, if he had a man to look after him". To this statement Byrd made the following reply, "What do you mean, do you want me to look after you?" Byrd then stated to Petitioner that he would think it over and let the Petitioner know. They again met on August 9, 1970, and Byrd than stated to the Petitioner that he had decided to help him. It was on this occasion that the Petitioner and Byrd agreed that the Petitioner would pay Byrd $7,800.00 per year, payable $150.00 per week. The Petitioner paid Byrd $250.00 on that occasion and they agreed that the arrangement would be retroactive to August 1, 1970.

On seven other occasions, the Petitioner and Byrd met wherein the Petitioner paid Byrd a sum of money on the annual arrangement. Each payment relating to a count in the Bill of Indictment.

Byrd at no time ever gave to the Petitioner the "Miranda Warning" although Byrd testified that from and after the meeting on August 3, 1970, that he not only had the Petitioner under investigation for violation of the liquor laws but also for investigation of bribery.

REASONS FOR ALLOWANCE OF WRIT

I

The decision of the Court of Appeals is in conflict with *Miranda v. Arizona*, 384 U S 436, 86 S Ct 1602, 16 L Ed 2d 694,

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10 A L R 3d 974; *Mathis v. US,* 391 U S 1, 88 S Ct 1503, 20 L Ed 2d 381; *Orozco v. Texas*, 394 U S 324, 89 S Ct 1905, 22 L Ed 2d 311; *U.S. v. Dickerson*, 413 F 2d 1111 (7 cir); U.S. v. Campos-Serrano, 430 F 2d 173 (7 cir).

The Court of Appeals held that the Miranda Warning was not required to be given to the Petitioner even though he was under investigation for violation of the Federal liquor laws and also for alleged bribery. The Petitioner contends that the Miranda Warning was required under the decisions cited above and the failure to give the Miranda Warning rendered any statement made by the Petitioner inadmissable in the trial of this action.

II

With regard to the issue of entrapment, Petitioner contends that the decision of the Court of Appeals is in conflict with *Sherman v. U.S.*, 356 U S 369, 78 S Ct 819, 2 L Ed 848; *U. S. v. Klosterman*, 248 F 2d 191 (3 Cir).

The Petitioner contends that when the Petitioner stated to the officer, Byrd, "A man could do some good if he had somebody to help him, if he had a man too look after him," that the Federal officer's reply to the Petitioner was the actual commencement of any bribe and not what the Petitioner initially stated to the officer and that therefore the officer initiated the bribery scheme.

III

As to whether Petitioner may be convicted of one crime

or of eight separate crimes, the Petitioner contends that the decision of the Court of Appeals is in conflict with the following decisions: *U. S. Universal CIT Credit Corporation*, 344 US 218, 97 L Ed 260, 73 S Ct 227; *Bell v. U. S.*, 352 U S 322, 1 L Ed 2d 370, 77 S Ct 403.

Petitioner contends that if he committed a crime at all, that it was only one such criminal bribe to pay the sum of $7,8000.00 annually to the officer, Byrd, that the payment of each installment did not constitute a separate crime as was the decision of the Courts below. In this case, the Federal Officer could have made as many different crimes as he would choose if the court permits such a situation. Justice dictates that the prosecution not be permitted to do this.

This is a case of serious importance in the administration of the criminal laws by the Courts of the United States, and the Petitioner respectfully prays that the Court allow the Writ and hear this case.

Respectfully submitted,

W.H. McElwee
John E. Hall

McELWEE & HALL
906 B Street Rear
North Wilkesboro
North Carolina 28659

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 72-1702

United States of America,

Appellee,

v.

Calvin Spurgeon Johnson,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

(Decided December 11, 1972.)

Before WINTER, CRAVEN, and BUTZNER, Circuit Judges.

John E. Hall and William H. McElwee on brief for Appellant; Keith S. Snyder, United States Attorney, and David B. Sentelle, Assistant United States Attorney, on brief for Appellee.

PER CURIAM:

Calvin Johnson appeals from a judgment of the district court (McMillan, J.) entered upon his conviction of bribing a Special Agent of the Internal Revenue Service in violation of 18 U S C Sec. 201 (b)(3) . The indictment consisted of eight counts, each of which charged defendant with directly and corruptly giving, offering, and promising to Special Agent Henry D. Byrd, Jr., a sum of money with the intent to induce Byrd to provide defendant with confidential information and to refrain from investigation and prosecuting Johnson in connection with the latter's operation of unlawful distilleries. The eight counts of the indictment corresponded to separate payments made on eight different days occurring between August 9, 1970 and November 23, 1970. Thr trial court modified its original sentence so that Johnson was ultimately sentenced to six months imprisonment of Count I and to a three-year contingent suspended sentence on Counts 2-8 inclusive.

Johnson contends that the district court committed prejudicial error (1) in permitting Special Agent Byrd to testify with respect to conversations he had with Johnson on August 3, 1970 and on August 9, 1970, because Byrd did no inform appellant of his *Miranda* rights; (2) in failing to allow Johnson's defense of entrapment; and (3) in denying Johnson's motion to set aside the verdict as to Counts 2 - 8 of the indictment.

Special Agent Byrd testified at trial that during the conversation of August 3, 1970, Johnson stated to him that " "[i]f a man could just set up and had some help that he might

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be able to make some money, might be able to do some good." Record, vol. II, at 17. Byrd reasonably construed this statement to be a bribery offer. After receiving this apparent offer, Byrd received authority from his superiors to continue to contact Johnson and to record their conversations with the view of obtaining evidence sufficient to justify the institution of bribery charges. At the conversation of August 9, 1970, Byrd and Johnson arranged the details of the bribery scheme. Under these circumstances, Byrd's testimony did not violate Johnson's rights under Miranda v. Arizona, 384 U. S. 436 (1966). Johnson was under no compulsion whatever when making the statements attributed to him. Such wholly voluntary, albeit self-incriminating, statements are not protected by the fifth amendment. Hoffa v. United States, 385 U. S. 293 (1966); Todisco V. United States, 298 F. 2d 208 (9 Cir. 1961). Nor was Byrd required to advise Johnson of his right to counsel prior to the August 3 and August 9 conversations, because "[o]ne is not entitled to counsel while committing his crime." Grier v. United States, 345 F. 2d 523, 524, (9 Cir. 1965); Garrett v. United States, 382 F. 2d 768 (9 Cir. 1967).

The district court correctly found Johnson's entrapment argument to be without merit. Byrd's trial testimony relating to the August 3 conversation and the transcript of the August 9 meeting provide substantial evidence that the bribery scheme originated with Johnson, not Byrd. It is settled in this Circuit that the government does not commit entrapment merely by providing an opportunity "for the commission of an offense by one otherwise predisposed to criminal activity. . . ." United States v. DeVore, 423 F. 2d 1069, 1070 (4 Cir. 1970). Here, Byrd did no more than to furnish Johnson with an opportunity to commit bribery after Johnson had demonstrated a predisposition to bribe him. Thus, no entrapment occurred.

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Defendant's final contention is that each bribery payment should have been treated as one part of a continuous transaction rather than as a separate offense. The statute applicable to this case makes it a crime to give anything of value to a public official with intent to induce the official "to do or omit to do any act in violation of his lawful duty." 18 U S C Sec. 201 (b) (3). Under this statute each payment by Johnson to Byrd constituted separate violation. In a factual situation very similar to the instant case, the Eighth Circuit held that where the defendants bribed a federal prohibition agent in exchange for protection from prosecution for violations of the National Prohibition Act, each biweekly payment of $500 could be treated as a separate offense, notwithstanding the agreement that each individual payment was but one installment on a total amount of $3,500. Patton v. United States, 42 F. 2d 68 (8 Cir. 1930). See also United States v. Keegan, 331 F. 2d 257 (7 Cir. 1964); United States v. Alaimo, 297 F. 2d 604 (3 Cir. 1961).

For the reasons stated, we find defendant's contentions to be without merit. We dispense with oral argument and affirm the judgment of the district court.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1060

CALVIN SPURGEON JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following trial in the United States District Court for the Western District of North Carolina sitting without a jury, petitioner was convicted on eight counts of having bribed a federal officer in violation of 18 U.S.C. 201 (b)(3). He was sentenced to six months' imprisonment on count one and to a three year suspended sentence on counts two through eight. The court of appeals affirmed in a *per curiam* opinion of December 11, 1972 (Pet. App.). The petition for certiorari was not filed until January 31, 1973 and is therefore out of time under Rule 22(2) of the Rules of this Court. There is in any event no reason for further review.

Petitioner's contentions concerning non-custodial "*Miranda*" warnings, entrapment, and multiple counts in the indictment for each installment payment made on a bribe were raised below and rejected in the opinion of the court of appeals, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.